

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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)	D.T.E. 02-24
Fitchburg Gas and Electric Light Company)	D.T.E. 02-25
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**APPEAL OF HEARING OFFICERS'
RULING PERTAINING TO PROCEDURAL SCHEDULE**

The Attorney General, pursuant to 220 C.M.R. § 106(6)(d)(3), appeals the briefing schedule established by the Department that requires intervenors to file their initial briefs only two weeks after the close of evidentiary hearings. As grounds for this appeal, the Attorney General states that the Hearing Officers' procedural schedule ruling constitutes an abuse of discretion to the extent that it deprives the Attorney General of his ability to adequately address the issues in these **two** rate cases.

I. BACKGROUND

On May 17, 2002, Fitchburg Gas and Electric Light Company ("Fitchburg" or "the Company") filed two separate rate cases for its gas and electric divisions. On June 12, 2002, the Attorney General and the Division of Energy Resources ("DOER") filed a Joint Motion seeking approval of a proposed procedural schedule ("Joint Procedural Schedule"). The Joint Procedural Schedule provided for a traditional seven-week briefing schedule.¹ On June 21, the Department held a procedural conference during which both the Attorney General and DOER emphasized the need for intervenors to have at least three weeks from the close of hearings to file initial briefs.² *See* Transcript. The Hearing Officers issued a procedural schedule on June 24, 2002, that provides intervenors with a mere two weeks to file initial briefs after the close of 15 days of hearings.

¹ A seven-week briefing schedule is traditionally used in a rate case and is usually divided into a 3-2-1-1 weekly time formula (Party A files an initial brief three weeks after the close of hearings; Party B files an initial brief two weeks after Party A's filing; Party A files a reply brief one week after Party B's filing; and Party B files a reply brief one week after Party A's reply filing). On June 20, 2002, the Company filed a proposed procedural schedule which substantially deviated from a typical briefing schedule format in a rate case.

² The Attorney General and DOER provided in their proposed Joint Procedural Schedule that the Company should be required to file its initial brief first and afforded three weeks for doing so. The Attorney General and DOER stated, however, that if the Department did not require the Company to file its initial brief first, a minimum of three weeks from the close of hearings was still required for the party going forward first to file initial briefs.

II. STANDARD OF REVIEW

The Department's procedural rules provide the presiding officer with the discretion to make all decisions regarding the admission or exclusion of evidence or any other procedural matters which may arise in the course of the proceeding. 220 C.M.R. § 1.06(6)(a); *see also Western Massachusetts Electric Company*, D.T.E. 97-120-3, p. 6 (1998). Additionally, the Department's procedural rules provide that to the extent that it is deemed necessary and practical, the presiding officer shall establish a fair and detailed schedule for the proceeding including, but not limited to, discovery, evidentiary hearings, and briefs. 220 C.M.R. § 1.06(6)(b); *see also Western Massachusetts Electric Company*, D.T.E. 97-120-3, at 6. A procedural schedule and its briefing schedule are within the discretion of a presiding officer. Discretion is not unlimited, however, and where a presiding officer abuses his or her discretion, the Department may overturn a ruling or decision of the presiding officer. *See Western Massachusetts Electric Company*, D.T.E. 97-120-3, pp. 1-12 (1998); *New England Telephone*, D.P.U. 90-206/91-66, pp. 9-11 (1991).

III. ARGUMENT

a. The Hearing Officers' procedural schedule ruling provides insufficient time for intervenors to file their initial briefs.

The Hearing Officers' procedural schedule ruling, which affords the intervenors a mere two weeks within which to file their initial briefs, provides insufficient time for intervenors to adequately address all issues expected to arise in this matter.³ Additionally, the procedural schedule applies to two separate rate cases which are expected to raise different issues, facts and circumstances that are unique to the Company's separate gas and electric divisions. The Hearing Officers' allotment to intervenors of two weeks to write initial briefs in two separate rate cases results in the Attorney General and other intervenors having effectively one week per brief for each rate case.⁴ Under its precedent in rate cases, the Department generally affords intervenors a minimum of three weeks from the close of hearings within which to file their initial briefs. *See e.g., Blackstone Gas Company*, D.T.E. 01-50 (2001). The Hearing Officers, then, in ignoring the general precedent in rate case procedural cases and the complexity of these two particular rate cases, abused their discretion with respect to their procedural schedule ruling. The Commission should overturn that ruling and provide intervenors with three weeks to file their initial briefs.

³ The Attorney General notes that Fitchburg is proposing a 48% increase in its gas distribution rates and a 27% increase in its electric distribution rates. These figures are unusually high. Additionally, the Department has issued recent decisions finding that the Company double charged gas customers for \$675,000 on gas inventory costs and also that the Company's rates were "neither just nor reasonable," warranting a \$1.2 million rate reduction. These facts require that these rate cases undergo thorough scrutiny.

⁴ The Company controls the timing and content of the petition and bears the burden of proof. The Company typically responds to record requests after the close of hearings and the Department usually leaves the record "open" to receive rate case updates. Under these circumstances then, every procedural advantage accrues to the Company. The Department should require the Company to file first in order to level the playing field between the parties.

b. The Hearing Officers' procedural schedule ruling constitutes an abuse of discretion where it violates due process by providing intervenors insufficient time within which to file their initial briefs.

The State Administrative Procedure Act, G.L. 30A, § 11, affords parties to adjudicatory proceedings before administrative agencies "reasonable opportunity to prepare and present evidence and argument." G.L. 30A, § 11(1). The current schedule does not give the Attorney General sufficient opportunity and time within which to prepare and present his arguments following the close of evidentiary hearings. The Company on the other hand has **four** weeks to write its initial brief. The Hearing Officers' ruling that the Attorney General may have only half that time is fundamentally unfair to the interests of the Company's ratepayers and, given the magnitude of the proposed rate increases, constitutes an abuse of discretion.

The timing of the case allows sufficient time for a fair briefing schedule. The Hearing Officers, for example have not scheduled any hearing dates for the last week in August. If hearing dates had been scheduled for that week, hearings would be scheduled to end the first week in September, rather than the second week, easily allowing the Attorney General and other intervenors a three week briefing schedule. "[T]he function of the department is the protection of public interests and not the promotion of private interests." *Lowell Gas Light Company v. Department of Public Utilities*, 319 Mass. 46, 52 (1946). The Hearing Officers' procedural schedule does not afford the Attorney General reasonable opportunity to address the issues raised at the hearing or to adequately address the public interest for the Department.⁵ The Hearing Officers' ruling, therefore, constitutes an abuse of discretion, and the Commission should overturn that ruling and provide intervenors with three weeks to file their initial briefs.

IV. CONCLUSION

For these reasons, the Attorney General requests that the Commission provide intervenors with three weeks to file their initial briefs together with such further relief as the Commission deems just and reasonable.

Very truly yours,

Wilner Borgella, Jr.
Assistant Attorney General
Utilities Division, 200 Portland Street
Boston, MA 02114
(617) 727-2200

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⁵ The Hearing Officers' procedural schedule ruling does not evenly distribute time reductions upon all parties. In rate cases, the briefing schedule typically follows a 3-2-1-1 weekly time formula. Under the current procedural schedule, the Company is allowed to keep four weeks for its initial brief and one week for its reply brief. Intervenors on the other hand are allowed to keep their one week for reply briefs but are not allowed to keep their three weeks for initial briefs and instead have that time period shortened. The Hearing Officers' procedural schedule ruling adversely affects only intervenors, while leaving the Company unscathed.